

76. Section 251(c)(3) expressly requires the incumbent LEC to “provide such unbundled elements in a manner that allows requesting carriers to combine” them. ^{59/} We request comment on how this obligation on the LEC should be carried out. We emphasize the importance of this language to enabling carriers to design and provide their own services over LEC network facilities. We also seek comment on how arguments -- made by certain LECs -- that a requesting carrier must own (unspecified) facilities to qualify to buy unbundled elements can be squared with the plain language of Section 251(c).

77. We also seek comment on requirements for LEC provisioning of the network elements to meet its Section 251(c)(3) obligations. We note that ordering and provisioning procedures are well established in the interexchange market. LECs are able to process customer requests to change IXCs through software changes within a day of an order, and can handle a huge volume of such changes at a time. The RBOCs will be the beneficiary of this automated system when they begin to offer interLATA services. We tentatively conclude that the LECs would not be in compliance with Section 251(c)(3) if administrative processes were not available that made it equally simple for a LEC local service customer to be switched to and served by a competing carrier using LEC network elements. We are particularly concerned that such administrative systems be in place and adequately tested at such time as the RBOCs begin to provide interLATA service within their own regions. ^{60/} We ask for comment on what our rules should specify in terms of operational support mechanisms for unbundled network elements. ^{61/}

iii. Section 251(c)(4) -- Resale

78. Section 252(c)(4) of the Act requires incumbent LECs to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” ^{62/} “Wholesale” prices for purposes of Section 251(c)(4) are in turn defined in terms of the retail rates “excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.” ^{63/}

79. We tentatively conclude that we should enunciate certain basic principles that will define the obligation of incumbent LECs with regard to resale of their end user services. First, we note that the language of the statute is unconditional: with one exception,

^{59/} 47 U.S.C. § 251(c)(3).

^{60/} Our concerns in this regard are similar to our concerns with respect to service resale under Section 251(c)(4), as discussed in the next section.

^{61/} For example, we invite comments on the process by which a requesting carrier, upon obtaining an order from an end user, could provision that customer using LEC loops, switch capacity, or termination (separately or combined). How would that process compare to the existing administrative procedures by which an end user is switched from one interexchange carrier to another?

^{62/} 47 U.S.C. § 251(c)(4).

^{63/} *Id.* at § 252(d)(3).

any retail service must be available for resale. ^{64/} The exception is that a state commission may prohibit resellers from offering a service that is available only to a category of subscribers to a different category of subscribers. Id. We tentatively conclude that this exception was intended to address the limited circumstance in which a LEC provides basic local exchange service to residential customers at a rate below the rate at which it offers the same service to business customers. We seek comment on this tentative conclusion.

80. Second, because the language of Section 251(c)(4) is otherwise unconditional, we propose to require LECs to make available all services for resale, including promotional offerings. It would appear to be essential to permit the LEC's competitors to resell any LEC end user service in order to be in a position to compete with the LEC in gaining local service customers. Otherwise the LECs could use promotions and other restricted offerings as a means to retain existing customers or to reclaim customers of another carrier, without making that same competitive opportunity available to others. As this section makes clear, Congress did not intend to make ownership of local exchange facilities a prerequisite for participation in the local service market. Restrictions on local service resale would appear to thwart this intent as well as to be inconsistent with the plain language of the statute.

81. We also tentatively conclude that we should prohibit LECs from withdrawing an existing service offering unless it can demonstrate to a state commission that such a withdrawal is in the public interest, and that competitors have an equally viable means of competing with the LEC's offering. ^{65/} We seek comment on this proposal. Parties also should address any other specific rules that would further define the scope of the LECs' obligations to provide resale of their own retail offerings.

82. We also seek comment on the proper pricing standard to be applied in determining whether the LEC has met the requirements of Section 251(c)(4) and 252(d)(3) that retail services be offered for resale at "wholesale" rates. We tentatively conclude that we should adopt a rule that defines, at a minimum, the types of costs that should be excluded from retail rates. We request that the parties identify the items that should be included as the "marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." We also seek comment on whether the plain language of the Act would permit wholesale rates to include any additional costs incurred by the LECs to provide service to resellers as opposed to retail customers. ^{66/}

83. Finally, as is the case with provisioning of unbundled network elements, we ask for comment on the need for a specific requirement that LECs develop automated operational support mechanisms for ordering, provisioning, and maintaining services

^{64/} Id. at § 251(c)(4).

^{65/} We note in this regard a recent decision in several states by US West to withdraw its Centrex offerings and to grandfather its existing Centrex customers.

^{66/} We note that it is not self-evident that it would cost LECs any more to provide service to a reseller than to a retail customer.

purchased on a resale basis.

84. In order to compete with the LEC's retail offerings, it will be necessary for the LEC's competitors to have a comparable ability to order, install, and repair, and maintain local service provided over LEC network facilities. We tentatively conclude that such a requirement is an essential part of fulfilling the Section 251(c)(4) duty to offer services for resale. We also tentatively conclude that such mechanisms must be in place before the competitive checklist and public interest tests for BOC interLATA entry of Section 271 can be met.

85. In the interexchange market, customers are able to switch carriers easily through an automated PIC change process. That process can handle large numbers of customer changes orders every day, at low cost, and does so transparently to the customer. If consumers are to have the same chance to take advantage of competitive choices in local service providers, then similar automated mechanisms must promptly be put in place that will effectively allow new entrants reselling LEC retail services (or employing LEC unbundled network components) to quickly and automatically extend service to new customers, and to do so in the kinds of volumes that we see today in the competitive interexchange market. Such ease of conversion will be especially critical if customers buy local and long distance service together, as it appears that they will, particularly if the RBOCs are granted in-region interLATA authority.

86. We ask for comment on the specific operational support mechanisms that might be required to make retail services available for resale. We tentatively conclude that such specific operational support would enable LEC competitors without facilities in a given area to order service, installation, repair, and number assignment; monitor network status; and bill for service. We encourage the parties to be as specific as possible in commenting on the types of operational support that will be needed.

87. We also expect that obtaining automated, nondiscriminatory operational support may require substantial regulatory efforts and time in addition to substantial efforts by the affected companies. Until support mechanisms are tested by actual businesses ordering and provisioning service to actual customers, moreover, it may be difficult for regulators to conclude that the systems are working in a manner that would allow competitors to provide service seamlessly over LEC network facilities.

88. We tentatively conclude, therefore, that pursuant to Section 251 implementing regulations, the Commission should establish specific requirements and timetables for accomplishing nondiscriminatory automated operational support mechanisms. Such regulations would ensure that LECs take the necessary steps to make resale a practical entry mechanism, while minimizing the dispute resolution litigation that could otherwise be associated with this process. We recognize, moreover, that such requirements would be amplified and implemented by the states.

89. We also tentatively conclude that the Commission should require the

RBOCs to demonstrate in any application for in-region interLATA entry that these mechanisms are in place and functioning. We ask for comment on the types of information that applicants should include in their applications for interLATA authority. For example, we tentatively conclude that those applications should include reports on service order processing mechanisms and intervals, maintenance procedures and intervals, response to trouble reports and intervals for responses, for both their own local customers and for the customers of other carriers using LEC unbundled network elements or resold retail LEC services. We ask for comment on this proposal and whether more or less information will be required for us to evaluate compliance by the applicants with the requirements of Section 251.

90. We note that some LECs have suggested that the availability of Section 251(c)(4) should be read to limit the ability of requesting carriers to combine network elements obtained pursuant to Section (c)(3). However, we tentatively conclude that this argument is inconsistent with the plain meaning of the 1996 Act.

91. Rather it appears that the resale obligation on the incumbent LECs under subsection (c)(4) is fundamentally different from the obligation to provide unbundled network elements in combination under subsection (c)(3). When a carrier purchases unbundled network elements, it is purchasing network facilities and functionality, and the capability to employ the network to design the carrier's own competitive retail and access offerings. ^{67/} In contrast, under Section 251(c)(4) the competing carrier buys only the LEC's retail service and reoffers it to its own retail customers. In the former case, the products provided by the LEC to the purchasing carrier are facilities and network functionality (as defined in Section 153(a)(45)). In the latter case, the product is a retail service priced at a wholesale rate.

92. The distinct pricing of these two products under Section 252 of the Act also is consistent with their distinct character. The network elements must be priced on the basis of the network cost, as provided in Section 252(d)(1). In contrast, LEC retail services are to be priced on the basis of the retail service rates (minus avoided costs), as provided in Section 252(d)(3). In these circumstances the LEC continues to provide exchange access to a given end user. It therefore has that revenue stream to support its network costs in addition to the wholesale prices paid by the reselling carrier.

93. We note in this regard that interexchange carriers have argued in state proceedings involving unbundling and resale that reliance solely on LEC retail offerings would prevent new entrants that do not own local exchange facilities from designing competitive and innovative service offerings and calling areas, and would as a practical matter preclude them from departing from the pricing design of the LEC's own retail local

^{67/} The definition of "network element" is phrased not in terms of services but in terms of "facility or equipment" used in the provision of a telecommunications service and in terms of network "features, functions, and capabilities." 47 U.S.C. § 153(a)(45).

service offerings. ^{68/} In contrast, they argue, if new entrants have the option of leasing the LEC network elements to provide competing local services, then the new entrants would have the freedom to innovate both in service design and pricing. They also would pay the cost of leasing the LEC network, and would be able to offer the same range of local exchange and exchange access services as the LEC over that network. ^{69/}

94. For the reasons discussed above, we tentatively conclude that Section 251 of the Telecom Act is broad enough to provide requesting carriers with both options: combination of unbundled network elements obtained at cost, and resale of the LEC's particular retail services. We invite comment on this issue.

iv. Section 251(c)(6) -- Collocation

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3. The Role of Negotiations in Interconnection

95. Section 251(c) also imposes procedural obligations on the incumbent LECs. Specifically, subsection 251(c)(1) imposes a duty on the LEC to "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill" the interconnection duties imposed there, and the general duties on all local exchange carriers imposed by Subsection 251(b). A corresponding duty to negotiate in good faith applies to any "requesting telecommunications carrier." ^{70/}

96. This duty to negotiate is separate from the substantive obligations on incumbent LECs in Sections 251(c)(2)-(6), and does not reduce their duty to satisfy those obligations. Therefore, the existence of the negotiation structure in no way reduces the need for us to define those substantive obligations and establish related rules and policies as we have proposed here. Quite the contrary, the more clearly we can state our regulations through this proceeding, the less likely it is that disputes will arise between incumbent LECs and requesting carriers in any negotiation process. We hope to create a system in which incumbent LECs and other carriers routinely negotiate interconnection agreements that "fulfill" the LECs' substantive duties to interconnect as mandated by the Act.

^{68/} See, e.g., Comments of CompTel in Investigation into Local Telephone Exchange Competition, Indiana Utility Regulatory Commission, Cause No. 39983, filed December 1, 1995, and March 8, 1996. _

^{69/} For example, the interexchange carriers argue that they might choose to recover the network costs they pay to the LECs through different pricing options such as less expensive custom calling services, different "free" calling zones, or other pricing innovations that might be more attractive to customers. They suggest that if they raise local service rates to end users, they would never be able to win customers from the existing LEC. This innovation in pricing may be foreshadowed in the cellular market. We note that for many years cellular "local" calling areas have been much larger than wireline zones.

^{70/} 47 U.S.C. § 251(c)(1).

97. We invite comment on any additional actions we can take to facilitate good faith negotiations between incumbent LECs and requesting carriers. For example, we note that, particularly at first, the benefits of any delays or breakdowns in the negotiation process would appear to benefit the LECs. If so, this could result in prolonged delays in reaching interconnection agreements that satisfy the obligations of the Act. We invite comment on the extent of the Commission's authority to take actions, directly or indirectly, that would address this apparent imbalance in bargaining position. For example, we ask parties to address whether anything in Telecom Act restricts the Commission from entertaining complaints when an incumbent LEC is in violation of its substantive obligations under Section 251. If not, then at what point in time would it be reasonable to entertain complaints for such violations? We also seek comment on whether the requirement that BOCs seeking interLATA entry authority must satisfy the Section 271(c)(2)(B) competitive checklist will provide adequate incentives to those companies to negotiate in good faith to satisfy the substantive requirements of the Sections 251 and 252 of the Act.

98. In that regard, we note that Section 252(a)(1) separately permits a LEC and a requesting carrier to enter into a voluntary binding agreement "without regard to the standards set forth in subsections (b) and (c) of section 251." We understand this provision to permit LECs and other carriers to enter into non-compliant arrangements where it serves their interest to do so, so long as the LECs are prepared to make the agreements available to other carriers on the same terms and conditions. We have no interest in limiting this negotiation process, which may permit carriers to structure their relationships more quickly, especially to meet special circumstances. On the other hand, we would be concerned if we perceived that incumbent LECs were attempting to steer requesting carriers into "voluntary" non-compliant agreements under Subsection 252(a)(1), rather than meeting their 251(c)(2) and (c)(3) obligations in the ordinary course as required by the Act. ^{71/}

99. We recognize that requesting carriers have the ability to protect their interests to a certain extent by requesting arbitration by a state commission. We are confident that these commissions will share our interest in enforcing the statutory obligations of Section 251 and will do so vigorously through the arbitration process. At a later date we may consider other actions that could facilitate the Section 252 negotiation process. We tentatively conclude that we should defer such a proceeding until experience develops regarding how the negotiation process is working in practice.

100. This rulemaking, in contrast, is intended to meet our initial statutory duty under Section 251(d) to develop regulations to implement Section 251 itself. We therefore encourage parties to focus their comments on those actions that are necessary immediately to foster more effective negotiations. As we have said, clarification of incumbent LEC obligations here will minimize later disputes, as well as the need for regulatory intervention by either state commissions or ourselves. We are prepared to consider other actions that

^{71/} Under the Act such agreements also would not satisfy the requirements of Section 271(c).

serve the same end.

CONCLUSION

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